

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

QUAKER PAINTING CORP.

and

Case No. 3-CA-25070

INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES DISTRICT COUNSEL NO. 4.

Lillian Kleingarder, esq.,
for the General Counsel
Richard D. Furlong, esq.,
of Buffalo, New York
for the Charging Party
Jay A. Pohlman, esq.,
of Blasdell, New York
for the Respondent

DECISION

Statement of the Case

ERIC M. FINE, Administrative Law Judge. This case was tried in Buffalo, New York on March 8, 2005. The charge and amended charged were filed by the International Union of Painters and Allied Trades District Counsel No. 4 (the Union). The complaint alleges that Quaker Painting Corp. (Respondent) violated Section 8(a)(1) of the Act by interrogating an employee applicant about his union membership; and that Respondent violated Section 8(a)(1) and (3) of the Act by since about March 29 and 30, 2004, refusing to consider for hire and refusing to hire Mark Stevens and David Zotara because they joined and assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.¹

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by the General Counsel and the oral arguments by the Union and the Respondent, I make the following²

¹ All dates are in 2004 unless otherwise indicated.

² In making the findings herein, I have considered all the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation*, 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951). All testimony has been considered, if certain aspects of a witness's testimony are not mentioned it is because it was not credited, or cumulative of the credited evidence or testimony set forth above. Further discussions of the witnesses' testimony and credibility are set forth throughout this decision.

Findings of Fact

I. Jurisdiction

Respondent, a corporation, has been a painting contractor in the construction industry at its facility in Blasdell, New York, from where it will annually provide services valued in excess of \$50,000 to Patrick Development of Western New York, Inc., and NVR, Inc./Ryan Homes, enterprises located in the state of New York which are directly engaged in interstate commerce. The Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Donald LaChance and Dave Schmelzinger are Respondent's president and vice president. LaChance owns 51 percent and Schmelzinger owns 49 percent of the company.³ Respondent paints the interiors of new homes, and also performs some exterior work on them, such as front doors and windows. LaChance's testimony reveals Respondent was working for at least three major accounts in March 2004. They were Ryan Homes, NVR Inc., Patrick Homes, and Federman Builders. LaChance testified Respondent picked up Patrick Homes as a customer while Respondent was running an ad for painters on March 27 and 28. In fact, Respondent's records reveal receipt of a deposit from Patrick Homes on March 19. LaChance testified when Respondent ran the ad for painters, Respondent had around seven or eight houses for Ryan that had to be completed by the end of April, as well as the one house that had to be completed for Patrick Homes during this time period. LaChance testified time was of the essence with these customers.

Respondent provided a summary of its employee hire and termination dates in response to a subpoena request. The summary reveals painter Kevin Firmstone left Respondent's employ on February 17; and painters Bernard Frost and Michael Kitcho left on February 27. Respondent ran the ad for painters in the Buffalo News on March 27 and 28, listing Schmelzinger's cell phone number. The ad reads: "Painters Min 3 yrs exp New home construction Own tools/transp." LaChance testified Respondent was hiring in March 2004 because they had a lot of work to be performed in a short period of time. Schmelzinger testified Respondent ran the ad in the Buffalo News "cause we needed guys, we needed help...".

B. The Union job applicants

1. Mark Stevens

Mark Stevens started his employment with the Union as a union organizer in 2000, and remained in that position at the time of the hearing. Stevens was a journeyman painter with the Union for 11 years before he became a union organizer, and had worked as a painter for 4 years prior to joining the Union for a total of 15 years. Stevens also served as a foreman and ran work for about 8 years after becoming a union member. Stevens last worked as full time painter sometime in 2000 before the Union hired him. He credibly testified he could still paint.

³ Respondent admits LaChance and Schmelzinger are its supervisors and agents under Sections 2(11) and 2(13) of the Act.

Stevens credibly testified he called the number listed in Respondent's ad around 10 a.m. on March 29. Stevens spoke to someone who did not identify himself. Stevens recorded the conversation. Respondent stipulated a copy of the recording into evidence, and agreed to the accuracy of the transcript of the recording. The transcript reads:

5 MS: Ah, yes, I'm calling in regard to the ad in the paper. For a painter? Is this the right number?
 Man: Yep, it's the right number. Your name?
 MS: Mark Stevens. S-T-E-V-E-N-S.
 10 Man: How many, how many years experience you got Mark?
 MS: About 15.
 Man: Ok. Where'd you work before? Give me a couple places.
 MS: I started off when I was going through college at a company called Keaten Painting. Dan Keaten out of Clarence.
 15 Man: Yeah.
 MS: Okay. Then I went into the union and worked for some union companies. Brush, rollup, spray, ran work, supervisor. You know, whatever it took.
 Man: How much you looking for an hour?
 MS: Well, you know, 12, 15 dollars an hours. Is that about right or is that what you're
 20 paying your guys now or...
 Man: I'll start you off at 12.
 MS: Okay, Does it matter that I'm in the union?
 Man: What's with these union guys calling? Dan Boody, Jr. just called me.
 MS: Oh okay.
 25 Man: What the hell would he be calling me for?
 MS: Probably same thing. Looking for work.
 Man: Yeah but, that's weird dude. You know what I mean? (Laughs) I smell a rat there.
 MS: Well, I mean, does it matter that we're in the union or
 Man: Umm, yeah, you guys are only gonna be temporary. Am I correct?
 30 Man: Well I mean your gonna scoot once a big job lands, right?
 MS: Well if you keep us busy, I mean we're hard workers, ya know? Plus, who knows, maybe you wanna become a union contractor. We can try to organize your company.
 Man: I think I'll pass on you, brother. I don't want to hear this stuff. You know what I am saying?
 35 MS: I mean we're hard workers.
 Man: I'm not saying you're not. I never said you weren't. But I don't like what I'm hearing. I don't like union guys calling me like this either. You know, and then they're trying to push. You know what I'm saying?
 MS: We're trying to make, we can make you money. I mean we can, and we could use
 40 the work.
 Man: Nah, I'll pass on ya. Thanks anyways.
 MS: What's the name of your company?
 (Hangs up).

45 Schmelzinger testified his cell phone number was listed in Respondent's March 27 and 28 newspaper ad and that he would have spoken to everyone who called to answer the ad. Schmelzinger testified he thought Stevens called to apply for a position in response to the ad and that he vaguely remembered talking to Stevens. Schmelzinger's testimony was marked by an admitted poor recollection, and I do not credit his testimony that Stevens asked for \$16 to \$18 an hour in wages, because the tape of the conversation reveals Stevens asked for \$12 to
 50

\$15 an hour, and Stevens agreed to Schmelzinger's offer to start at \$12 an hour.⁴

Schmelzinger testified Stevens said he was with the Union. However, I do not credit Schmelzinger's claim that Stevens said he "wanted to come in and show our guys a better way..." or that Stevens said he was looking for men for the Union and that he wanted to take Respondent's employees for the Union. Stevens credibly denied making these statements, and they did not appear on the tape of the conversation which I have concluded was a complete recording of what transpired. Rather, the tape reveals Stevens said he was looking for work, that he gave assurances of remaining if Respondent kept him busy, and that he said he wanted to organize Respondent's employees. I also do not credit Schmelzinger's testimony that he told Stevens the position was filled as this statement does not appear on the tape of the conversation.

2. Dave Zotara

David Zotara, an apprentice, has been a member of the Union since May 2004. Zotara testified that before that, "I've done a decent amount of residential, new builds, repaints, some commercial paint for a little over 4 years. He also testified he has been painting his whole life as," I come from a long line of union painters."

Stevens credibly testified he showed Respondent's March 28 ad to Zotara shortly after Steven's March 29 conversation with Schmelzinger. At that time, Zotara was applying to join the Union's apprenticeship program. Stevens testified Zotara called the posted number in response to the ad. The call was from Stevens' office at the union hall. Stevens and Zotara credibly testified Stevens dialed the phone and was present for and recorded the conversation. Zotara credibly testified Zotara made the call on Tuesday, March 30. Respondent did not object to the admission of the tape and transcript of the March 30 phone call into evidence and stipulated to accuracy of the transcript. The transcript of the call reads as follows:

Man: Hello.

DZ: Hello. I'm calling about the ad in the paper you got for the painters.

Man: What's your name?

DZ: Dave

Man: Dave who?

DZ: Zotara.

Man: Where have you worked before Dave?

DZ: I was working for CA Construction. I've been there for about 4 years now.

Man: CA Construction. What a union job?

DZ: No. Why, does it matter?

Man: Um, I don't know. I've had a lot of union guys calling me.

DZ: Have you really?

Man: Yeah.

DZ: No, I ain't got no affiliation with that.

Man: Uh-huh. Um, how many years experience do you have?

DZ: I was with CA for about 4 years and I mean, other than that, just did, you know, kind a, my own type of painting work. But I mean the only things on the books, really I have is that CA Construction.

Man: What kind of painting did you do for them?

DZ: I was on the new build residential.

Man: Oh. Huh. Okay. How much money you looking for?

⁴ Stevens also credibly testified that he never asked for \$16 an hour.

DZ: Um, I was making \$12 there. I mean, if you can match it, that'd be great.

Man: I see. Do you have your own tools?

DZ: Yes.

Man: Do you have a vehicle?

5 DZ: Yes I do.

Man: Okay. Give me your phone number.

DZ: Okay. (Phone number provided.)

Man: Okay. Can you spell your last name?

DZ: Z as in zebra o-t-a-r-a.

10 Man: Okay. (Repeats phone number)

DZ: That's right, yeah.

Man: Okay, Dave, let me see if something else comes up. I hired like 3 guys, ya know, that doesn't mean they're going to show up tomorrow. You know what I'm saying.

DZ: Right. Um, what is the name of your business? I mean-

15 Man: Quaker Painting.

DZ: What's that?

Man: Quaker Painting.

DZ: Quaker? Okay.

20 Man: Yeah, we do new home construction. We have four different builders, so we're busy as all hell.

DZ: Okay.

Man: Okay? I'll give you a buzz if ya know, they don't show up. Put it that way.

DZ: All right, cool.

Man: All right, thanks Dave

25 DZ: All right, thanks.

Man: Bye-bye

DZ: Bye.

30 Zotara credibly testified he received a call from someone who sounded like the person he spoke to on March 30 on the following Saturday. The caller did not identify himself, but said he was from Quaker Painting. The man said they had a problem with two out of the three painters they hired, and he was offering Zotara a job. He asked if Zotara was still looking for work and Zotara said he was. He asked again about Zotara's tools, and reliable transportation. Zotara said he had both. The man gave Zotara directions to a jobsite, and told him to come in to start at 7 a.m. on Monday to work at a home in a Ryan development. Zotara could not recall 35 if the development was in Amherst or Orchard Park. Zotara testified he attempted to report to the jobsite Monday morning as directed and there was a big Ryan Homes sign at the entrance to the development when he arrived. However, when Zotara arrived at the designated location, there was a finished home there, rather than a home under construction. Zotara phoned the 40 number from the newspaper ad and the person who answered sounded like the person Zotara had spoken to in his prior calls. Zotara testified he identified himself, stated he was trying to report to work, and they might have had the jobsites mixed up. Zotara testified the man laughed at him, and said "union" then hung up the phone. Zotara drove to the union hall, reported the incident to Stevens, and they attempted to call Respondent's number two more times, but 45 received no answer.

Schmelzinger testified in an ambiguous fashion claiming he did not remember having a conversation with Zotara. However, I have found Zotara, considering the content of his testimony and his demeanor, as substantiated by the tape of his initial conversation with 50 Schmelzinger, to be a credible witness. I therefore have credited Zotara's testimony as set forth

above.⁵ In doing so, I have rejected Schmelzinger's claim that he did not recall talking to Zotara. For I find, Schmelzinger's questioning Zotara about the Union, and his subsequent offering Zotara a job only to recant the offer while stating "union" was something Schmelzinger was not likely to forget. While Zotara did not inform Schmelzinger of Zotara's union status during their phone calls, Zotara's initial call was placed from Stevens' office to Schmelzinger's cell phone, and Zotara testified he came from a long line of union painters. I have concluded Schmelzinger was able to determine Zotara was connected to the Union before Zotara reported to work, either by comparing numbers recorded on his cell phone or in some other fashion and that Schmelzinger mentioned the word union and laughed at Zotara during their final phone call as Zotara testified. Schmelzinger's phone call with Stevens and his questioning Zotara about his union activity during their initial call suggests Schmelzinger was interested in weeding out union sponsored applicants from Respondent's hiring pool. I have concluded he acted on that proclivity to determine Zotara's pro-union status.

3. ANTHONY ROMANO

Stevens testified he also talked to Anthony Romano, a union member, on April 15, regarding Respondent's March 29 ad. Stevens told Romano there was an ad in the Buffalo News looking for a painter and to give the number a call to look for work. Romano credibly testified he has been a member of the Union for over 2 years and he has about 8 years painting experience. Romano confirmed Stevens gave him Respondent's phone number and Romano called the number. Romano testified he spoke to LaChance the first time he called. Romano testified he called and said he was looking for employment. LaChance asked for Romano's experience, and Romano told him his experience concerning new homes. Romano told LaChance that Romano had his own tools. LaChance wanted to know how soon Romano could start, and Romano told him the next day. LaChance told him to show up the following morning and he gave Romano directions to the jobsite. Romano asked the pay rate, and he was told they would discuss it after they saw how he worked.

Romano reported to a new Ryan Homes development on April 16.⁶ Romano arrived at the site somewhere between 8 and 9 a.m. He had been told to report at 7 a.m., but had difficulty finding the site. He met Schmelzinger there, who told him that Romano had spoken to LaChance on the phone because LaChance had answered Schmelzinger's phone. Schmelzinger said Romano would deal with Schmelzinger in the future. When Romano arrived at the site Schmelzinger started Romano painting a ceiling. Romano asked if he needed to fill out any paper work, and Schmelzinger said they would discuss that later, and told Romano to get the work completed. Romano testified he completed the task before noon, but Romano worked at a slower pace than Schmelzinger wanted, and Schmelzinger told him it was not going to work. Romano told Schmelzinger that he used \$50 worth of gas to get there with his truck, that he had no gas, and that Schmelzinger should at least give him a chance to prove himself through the day. Schmelzinger disagreed, but gave Romano \$35 in cash. Romano never filled out any paper work for employment with Respondent. Romano called Stevens after he left

⁵ While Schmelzinger did not identify himself by name during his phone calls with Zotara, I have concluded Zotara spoke to Schmelzinger, whose cell phone number was placed in Respondent's newspaper ad, and was the number dialed by Stevens during Zotara's taped conversation with Schmelzinger. Moreover, Schmelzinger reluctantly admitted talking to Stevens and the voice of the person on the taped call with Stevens appears to be the same as the person on the taped call with Zotara.

⁶ Romano initially testified the call was on a Wednesday, however, April 15, was a Thursday.

Respondent's site and told him what happened at the job.

I have credited Romano's testimony, considering his demeanor, which was not denied by either LaChance or Schmelzinger. Romano testified in a specific and credible fashion.

There were also several factors substantiating his claims. Both LaChance and Schmelzinger admitted job applicants did not always fill out paper work when first hired, and Respondent's record keeping system appears to be somewhat haphazard. Moreover, Respondent lost one of its new hires, James Gruber on April 12, after Gruber sustained a knee injury so it is likely Respondent would attempt to replace someone who left unexpectedly. Finally, Respondent ran another newspaper ad seeking painters on June 27, and hired a painter on June 28 and another on July 5. While Romano was affiliated with the Union when he applied there is no contention Respondent was aware of his union status at the time Respondent's officials offered him work.

4. Steven's July 1 conversation with Schmelzinger

Stevens identified a copy of another ad seeking a painter Respondent placed in the Buffalo Job Finder, an insert in the Buffalo News, on June 27. The ad had the same cell phone number posted in Respondent's March 27 and 28 ad. Stevens called in response to the ad on July 1. Stevens spoke Schmelzinger as he credibly testified he spoke to the same person he spoke to during his March 29 call. Stevens recorded the conversation, and the transcript reads as follows:

Man: Hello?

MS: Yeah, I'm answering an ad in the paper for a painter.

Man: Name?

MS: Mark Stevens. S-T-E-V-E-N-S.

Man: Why do you union guys keep calling me?

MS: We'd like to organize your shop. (Inaudible) See if you'll go union.

Man: Dude, why would I do that?

MS: It's very beneficial for you. We got good quality people.

Man: No, no, no, no, no. I don't want nobody going union. Union's bullshit. Quit calling me.

MS: Well, I'm a good worker. I could make you money.

(Hangs up)⁷

Schmelzinger testified he did not remember whether he had a second conversation with Stevens or telling Stevens the Union was bullshit. However, Schmelzinger also did not deny the conversation took place. Schmelzinger also testified he did not recall running another advertisement for employees after March 27 and 28, stating, "I don't think I did." Again I do not find Schmelzinger's testimony to be worthy of belief. Given the content of Schmelzinger's conversation with Stevens, I do not credit his claim that he could not recall it occurred. Moreover the Union produced an ad that was run on June 27, listing Schmelzinger's cell phone number as the contact. Respondent hired a painter on June 28 and another on July 5. I therefore do not credit Schmelzinger's claim that he did not recall running the ad. I also do not credit LaChance's testimony that he was not aware that Respondent advertised for painters

⁷ Respondent stipulated to the accuracy and admission into evidence of the above cited tape transcript. Counsel for the General Counsel attempted to put into evidence another transcript of the above conversation containing language that was apparently no longer audible on the tape. Respondent objected to that transcript version which was General Counsel Exhibit 10(c) and that objection was sustained.

following the initial March 27 and 28 newspaper ad.

B. Analysis

1. Legal principles

In *Ferguson Electric Co.*, 330 NLRB 514, 515 (2000), enfd. 242 F.3d 426 (2nd Cir. 2001), the Board citing *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), held that an individual's status as a paid full-time union organizer does not deprive him of protection of the Act, and that "Employment applicants are 'employees' within the meaning of Section 2(3) of the Act, even if they are paid by a union to organize their prospective employer." In *Wayne Erecting, Inc.*, 333 NLRB 1212 (2001), the Board, relying on its decision in *FES (A Division of Thermo Power)*, 331 NLRB 9 (2000), set forth the following framework for analysis of both refusal-to-hire and refusal-to-consider for hire allegations. The Board stated in *Wayne Erecting, Inc.*, supra at 1212 that:

In order to establish a discriminatory refusal-to-consider violation under the FES framework, the General Counsel must show:

(1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicant for employment.

In order to establish a discriminatory refusal-to-hire violation, the General Counsel must establish the following elements:

(1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once the General Counsel has met his initial burden for the refusal to consider and refusal to hire, respectively, the burden shifts to the respondent to show that it would not have considered or hired, respectively, the applicants even in the absence of their union activity or affiliation. (Citations omitted.)

The Board has held the questioning of applicants, who do not openly display their union proclivities, as to their union status during the interview process constitutes a coercive interrogation. See, *Facchina Construction Co.*, 343 NLRB No. 98, slip op. at 1, (2004); *Godsell Contracting*, 320 NLRB 871, 873 (1996); and *Willmar Electric Service, Inc.*, 303 NLRB 245, 252 (1991) enfd. 968 F.2d 1327 (DC Cir. 1992). Moreover, while specific conduct is not alleged as a violation of the Act in the complaint, it can serve to constitute evidence of animus on the part of a respondent to employees' union activity. See, *Facchina Construction Co.*, supra slip op. at 2; *Stoody Co.*, 312 NLRB 1175, 1182 (1993); *General Battery Corp.*, 241 NLRB 1166, 1169 (1979); and *Meritor, Automotive, Inc.*, 328 NLRB 813, 813 (1999), holding that, "It is well settled that conduct that exhibits animus but that is not independently alleged or found to violate the Act may be used to shed light on the motive for other conduct that is alleged to be unlawful."

2. Conclusions

I find the General Counsel has made out a prima facie case of a discriminatory refusal to consider for hire and refusal to hire Stevens and Zotara. Respondent's officials LaChance and Schmelzinger testified Respondent ran an ad for painters in March 27 and March 28, due to an

increase in business, and “cause we needed guys, we needed help...”. Respondent had also lost three painters during the period of February 17 to February 27. The ad called for painters with a minimum of 3 years experience, with their own tools and transportation. Stevens called in response to the ad on the morning of March 29. Stevens told Schmelzinger he had 15 years experience including a background of working for some union companies, and was seeking a pay scale of between \$12 and \$15 an hour. Schmelzinger responded, “I’ll start you off at 12.” Stevens stated, “Okay, Does it matter that I’m in the Union?” Schmelzinger stated, “What’s with these union guys calling?” Stevens stated he was looking for work. Schmelzinger stated, “That’s weird dude.” He also stated, “I smell a rat there.” Stevens assured Schmelzinger that he was not seeking short term employment, that he intended to stay as long as Respondent kept him busy, asked if Schmelzinger wanted to be a union contractor, and stated that, “We can try to organize your company.” Schmelzinger stated, “I think I’ll pass on you, brother. I don’t want to hear this stuff.” Schmelzinger stated he did not disagree to Stevens’ assertion that union members were hard workers, but stated, “I don’t like what I’m hearing. I don’t like union guys calling me like this either. You know, and then they’re trying to push.” Schmelzinger told Stevens, “I’ll pass on ya.” Then Schmelzinger hung up.

I find that during the conversation, having heard Stevens’ qualifications, Schmelzinger offered him a job at \$12 an hour, to which Stevens agreed. This constitutes direct evidence that Respondent was still hiring at the time of the call. Then having heard that Stevens was an active member of the union with an intent to organize Respondent, Schmelzinger said what is this with you union guys calling me, and that “I smell a rat.” Schmelzinger stated, “I don’t want to hear this stuff.” Schmelzinger stated, “I don’t like what I’m hearing. I don’t like union guys calling me like this either. You know, and then they’re trying to push.” These statements, although not alleged as violative of the Act, constitute strong evidence of animus to Stevens’ union status, and direct evidence that Stevens was not hired because of his union status. *Facchina Construction Co.*, supra slip op at 2; *Stoody Co.*, supra at 1182; *General Battery Corp.*, supra at 1169; and *Meritor, Automotive, Inc.*, supra at 813.

Respondent ran another ad for painters on June 27. Stevens called in response to the ad on July 1, and again spoke to Schmelzinger. As soon as Stevens gave his name, Schmelzinger’s response was, “Why do you union guys keep calling me?” Stevens replied “We’d like to organize your shop.” Then stated, “See if you’ll go union.” Schmelzinger stated, “Why would I do that?” Stevens stated it was beneficial to Respondent, and the Union had good quality people. Schmelzinger stated, “No, no, no, no, no. I don’t want nobody going union. Union’s bullshit. Quit calling me.” Respondent hired a painter on June 28, and July 5, the latter only lasting a day due to a motor vehicle accident. Again, the General Counsel has established Respondent was hiring when Stevens called, and Schmelzinger’s statements to Stevens reveal strong evidence of animus towards his union status, and direct evidence that Stevens was excluded from consideration for hire and not hired because of his union status.

Zotara called Schmelzinger on Schmelzinger’s his cell phone from Stevens’ office on March 30, in response to Respondent’s March 28 ad. Zotara told Schmelzinger his name, and told him he worked for 4 years as a painter at CA construction. Schmelzinger asked if that was a union job. Zotara said no, and asked if that made a difference. Schmelzinger stated, “I don’t know. I’ve had a lot of union guys calling me.” Zotara told Schmelzinger he was seeking \$12 an hour, that he had his own tools and transportation. Schmelzinger took Zotara’s name and phone number. Schmelzinger told Zotara that he hired three men, but he did not know if they were going to show up tomorrow, which would have been Wednesday, March 31. Schmelzinger told Zotara, “We have four different builders, so we are busy as all hell.” Schmelzinger told Zotara he would give him a call if the new hires did not show up. Zotara credibly testified Schmelzinger gave him a call the following Saturday, which was April 3, and

told him they had a problem with two out of the three painters they hired. Schmelzinger told Zotara to report to work 7 a.m. the following Monday, April 5, and gave him an address to a house at a Ryan development. Zotara attempted to find the location on April 5. When he could not, he phoned Schmelzinger, who laughed at him, said "union" and then hung up the phone. I find that Schmelzinger's questioning Zotara on March 30, if his prior employer was a union company, and then telling Zotara that Schmelzinger did not know if it made a difference in his employment application constituted a coercive interrogation in violation of Section 8(a)(1) of the Act. Zotara was not an open union supporter at the time he placed the call seeking employment. See, *Facchina Construction Co.*, supra, slip op. at 1; *Godsell Contracting*, supra, at 873; and *Willmar Electric Service, Inc.*, supra, at 252. Moreover, Schmelzinger's laughing at Zotara on April 5, stating "union" and then hanging up the phone on him, clearly renders the prior interrogation as coercive.

I also find the General Counsel has established a prima facie case that Respondent refused to consider and refused to hire Zotara because of his union affiliation. The General Counsel has established Respondent had an intent to hire as it ran a newspaper ad on March 27 and 28 seeking painters. Zotara called in response to the ad on March 31, gave his qualifications, and Schmelzinger took his name and number. Schmelzinger told him he had hired three painters, but was not sure they would work out. Schmelzinger called Zotara on April 3, and told him he had a problem with two of the three other painters and told him to report to work on Monday April 5. When Zotara called Schmelzinger on April 5 for directions, Schmelzinger said union and hung up the phone. The statements Schmelzinger made to Stevens, as set forth above, his unlawful interrogation of Zotara, and his stating union and hanging up on Zotara reveal Respondent harbored strong animus to Zotara's pro union status. While not a union member at the time, Zotara had applied to the Union's apprenticeship program, was notified of Respondent's ad by Stevens, and placed his initial call to Schmelzinger from Steven's office. Based on Zotara's credited testimony, I have concluded Respondent was hiring at the time of Schmelzinger's April 3 phone call to Zotara as Schmelzinger offered him work. Schmelzinger also offered Romano an opportunity for work on April 15, at a time when Romano had not revealed his pro union status to Schmelzinger. Respondent's records also reveal Respondent lost an employee on April 12, and hired two more on June 28, and July 5.⁸

Since I have concluded the General Counsel has established a strong prima facie case that Respondent refused to consider for hire and refused to hire Stevens and Zotara because of their union activities, the burden shifts to Respondent to show that it would not have considered or hired them even in the absence of their union activity or affiliation. I have concluded Respondent has failed to meet this burden as Respondent's defense was in large part based on the vague and inconsistent testimony of LaChance and Schmelzinger. Neither of whom I found to be very credible witnesses since their testimony was also marked by poor recall, supported by poorly maintained records, and undercut by recordings of Schmelzinger's conversations with union applicants.

Respondent lost three painters in February. Respondent ran an ad in the Buffalo News on March 27 and 28, listing Schmelzinger's cell phone number seeking painters. Both LaChance and Schmelzinger testified Respondent ran the ad because they had a lot of work.

⁸ Respondent's records were incomplete concerning the number of painters it offered work during this period. For example, Romano worked a few hours for Respondent on April 16, but never filled out any paper work, and was not reported on Respondent's list of hires formulated in Respondent's response to outstanding subpoena requests. Respondent's officials admitted employees did not always fill out paper work on their first day of the job.

LaChance testified applicants are hired based on a telephone interview and then they are told just to show up at the jobsite and they go to work. LaChance testified he usually has paperwork at the site for the applicant to fill out. However, sometimes LaChance does not have it with him. For example, LaChance testified Respondent hired Tim Phillips on July 5. However, Phillips
 5 became involved in a vehicle accident and only worked one day. Respondent could produce no employment papers for Phillips. LaChance testified the paper work probably got "lost in the shuffle." Schmelzinger testified the applicants did not fill out an application, but rather applied by phone interview. If Schmelzinger decides to hire someone over the phone, they report directly to the jobsite where they start. When they get to the jobsite, they are given a W-4 form,
 10 and another sheet to fill out. Schmelzinger, like LaChance, testified sometimes Respondent does not have the paper work at the site when the employees first report. If that happens they are still permitted to work, and will fill out the documents later on.

LaChance testified Respondent only intended to hire two painters from the March
 15 newspaper ad. However, the tape of Schmelzinger's March 30 phone call with Zotara reveals Schmelzinger told Zotara that he had hired three painters, but he was not sure if they would work out.⁹ LaChance testified Respondent only actually hired one employee through the ad Thomas Murphy. LaChance testified they also hired James Gruber, who was a friend of
 20 LaChance as they had worked together on a prior job. However, Gruber only worked around two weeks, with an April 12 termination date when he was injured.

LaChance testified Respondent hired Thomas Murphy and James Gruber on March 29. Yet, Respondent had no records to show their actual start dates or hire dates. LaChance testified they applied on March 27 or 28, and they probably spoke to Schmelzinger since his
 25 number was in the paper.¹⁰ LaChance testified they would have started the Monday after the ad was run, which was March 29. However, Murphy did not sign off on Respondent's W-4 form until April 5, and Gruber did not sign off until April 6. LaChance admitted he never saw Gruber or Murphy working on March 29. He testified his claim they started on that date was only based on surmise. Schmelzinger testified he received calls from about five to eight people in response
 30 to Respondent's March 27 and 28 ad but he had no list of those who called, and had little recollection of their qualifications. Schmelzinger claimed Murphy was the first person to call in response to the ad. Schmelzinger initially testified Murphy started work on March 29, "and probably called so I talked to him the 28th, obviously." Schmelzinger then admitted he did not know whether he talked to Murphy on March 28. Schmelzinger then testified he was not sure
 35 Murphy started on March 29 and that Murphy could have started on March 30 or 31. Schmelzinger testified he did not hire or talk to Gruber, rather LaChance hired him as Gruber knew LaChance's brother. Schmelzinger testified that Gruber called after Murphy. Schmelzinger testified Gruber did not start with Schmelzinger on March 29. He testified he did not know if Gruber started the same day as Murphy. Schmelzinger testified he learned Gruber
 40 was hired around a couple of days after he hired Murphy. LaChance told Schmelzinger that Gruber had been hired during a phone call.

Schmelzinger testified he vaguely remembered talking to Stevens, who applied for the position in response to the ad. Schmelzinger testified Stevens asked for \$16 to \$18 an hour in
 45 wages. Schmelzinger initially did not remember if he told Stevens the position was filled. However, he testified in his pre-hearing affidavit he told Stevens the position was filled. Schmelzinger later testified he told Stevens the position was filled with Murphy. He testified Stevens could have been the second caller. Schmelzinger testified Stevens said he wanted to

⁹ Schmelzinger actually claimed it was Respondent's intent to only hire one employee.

¹⁰ LaChance had earlier testified that he was the one who spoke with Gruber.

show guys a better way and he was looking for men for the union. Schmelzinger said he would not let him do that. Schmelzinger testified Respondent did not need someone to come in to take Respondent's employees. Schmelzinger testified he did not hire Stevens because Respondent only needed one person and he had hired Murphy. Schmelzinger testified he did not remember having a conversation with Zotara.

Respondent states in its answer to the consolidated complaint that Stevens was not hired for two reasons, the position was already filled, and Stevens demanded a starting pay rate of \$17.00 per hour, which was \$5.00 more than the position paid. Respondent states in its answer that Zotara never contacted Respondent to apply for employment. Respondent's counsel also argued, during his oral argument at the hearing, that Stevens stated they would take Respondent's employees if a higher paying job came along.

I find the tapes of Schmelzinger's phone conversations with Stevens and Zotara, as supported by Stevens and Zotara's credited testimony, establish the reasons Respondent has advanced for not hiring Stevens and Zotara are pretextual. Stevens never asked for a pay rate of \$17 an hour. Rather, he asked for a rate of \$12 to \$15 an hour, to which Schmelzinger stated he would start him at \$12. Stevens agreed to the starting rate offered by Schmelzinger. It was only when Schmelzinger heard it was Stevens' intent to organize Respondent that he recanted the offer. Moreover, Stevens never stated he would leave Respondent's employ or take Respondent's employees. Rather, Schmelzinger suggested Stevens would leave if there was a higher paying job, to which Stevens responded that he would stay if Respondent kept him busy. There was no mention during the call of any intent to take Respondent's employees. Respondent has also failed to establish the position was already filled at the time Stevens applied. In fact, I have found that was not the case as Schmelzinger offered Stevens a position during their initial phone call on March 29. He only recanted the offer during the call after learning of Stevens' intent to organize Respondent.¹¹ Moreover, Respondent's story kept on changing as to the number of painters to be hired in response to the ad. Schmelzinger testified its was only one, but he told Zotara during their March 30 phone call he had hired three, but was not sure they were going to work out. LaChance testified it was Respondent's intent to hire two painters in response to the ad.

I have concluded Schmelzinger offered Zotara a job on April 1 with an April 3 start date during their phone call, only to recant the offer on April 3, when he learned of Zotara's pro-union status. Respondent continued to hire after rejecting Stevens and Zotara, as Romano, who had not informed Respondent of his union status was given an offer on April 15. Respondent also ran another ad for painters on June 27, and Respondent hired painters on June 28, and July 5, although Stevens again applied on July 1 and his application was again ignored. Schmelzinger made several anti union remarks during the July 1 phone call with Stevens.

Accordingly, I find Respondent failed to rebut the General Counsel's strong prima facie case that Respondent refused to consider for hire and refused to hire Stevens and Zotara because of their union status. I find Respondent refused to consider for hire and refused to hire Stevens and Zotara in violation of Section 8(a)(1) and (3) of the Act.¹²

¹¹ I have concluded that had Schmelzinger not recanted the job offer to Stevens that Stevens would have started on March 30, as LaChance and Romano's testimony reveals Respondent was attempting to start successful applicants as soon as possible. I also find Respondent has failed to establish it hired either Murphy, Gruber, or anyone else prior to the time Stevens placed his initial call to Schmelzinger.

¹² Respondent raised several affirmative defenses in its answer, and most have already

Continued

Conclusions of Law

1. By coercively interrogating a job applicant by questioning him about the union status of his prior employer Respondent violated Section 8(a)(1) of the Act.

2. By refusing to consider for employment and refusing to hire applicants Mark Stevens and David Zotara because of their union affiliation and activities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) of the Act.

Remedy

Having found Respondent has engaged in certain unfair labor practices, I shall recommend it be required to cease and desist there from and to take certain affirmative action necessary to effectuate the policies of the Act. I shall also recommend Respondent be ordered to offer Mark Stevens and David Zotara employment in the positions which they sought to apply without prejudice to their seniority or other rights or privileges they would have enjoyed had they been hired, and make them whole for any loss they have suffered as a result of Respondent's refusal to hire and to consider them for hire in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, Quaker Painting Corp., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a). Coercively interrogating job applicants by questioning them about the union status of their prior employers.

(b). Refusing to consider for employment and refusing to hire job applicants because of their union affiliation and activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in

been addressed by the findings and conclusions in this decision. Respondent asserts in its fourth affirmative defense that the charges were not filed in a timely fashion and were intentionally delayed to exacerbate the alleged damages, contrary to the doctrine of laches. However, Respondent admits the allegations set forth in paragraph one of the complaint thereby establishing that the initial charge was filed within the time requirements of Section 10(b) of the Act. I also find the allegation of an interrogation set forth in the amended charge was closely related to the refusal to consider and refusal to hire allegations and therefore was properly litigated. See, *Florstar Sales*, 325 NLRB 1210, 1211 (1998). Respondent put no evidence into the record to establish the filing of the charge was intentionally delayed, or in support of its sixth affirmative defense set forth in its answer to the complaint, and I find those defenses are without merit. See, *Lexus of Concord, Inc.*, 330 NLRB 1409, 1410 (2000).

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Mark Stevens and David Zotara employment in the position for which they sought to apply without prejudice to their seniority or other rights or privileges to which they would have been entitled absent the discrimination against them discharging, if necessary, any one occupying those positions to which they would have been employed.

(b) Within 14 days from the date of the Board's Order, make Mark Stevens and David Zotara whole for any loss of earnings they may have suffered by reason of the discrimination against them as set forth in the remedy section of this decision.

(c) Within 14 days of the Board's Order, remove from its files any reference to the unlawful refusal to employ Mark Stevens and David Zotara and within 3 days thereafter, notify them in writing that this has been done and that this personnel action will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records and reports, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Blasdell, New York, and at all its current jobsites copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 29, 2004.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.
June 28, 2005

Eric M. Fine
Administrative Law Judge

¹⁴ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate job applicants by questioning them about the union status of their prior employers.

WE WILL NOT refuse to consider for employment or refuse to hire job applicants because of their membership in or activities in behalf of the International Union of Painters and Allied Trades District Council No. 4, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Mark Stevens and David Zotara employment in the positions which they sought to apply without prejudice to their seniority or other rights or privileges to which they would have been entitled absent the discrimination against them, discharging, if necessary any employees occupying those positions.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to employ Mark Stevens and David Zotara and within 3 days thereafter, notify them in writing that this has been done and that this personnel action will not be used against him in any way.

WE WILL make Mark Stevens and David Zotara whole for any loss of earnings they may have suffered by reason of the discrimination against them, plus interest.

QUAKER PAINTING CORP.

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 111 West Huron Street, Room 901, Buffalo, New York 14202-2387, Telephone 716-551-4951.